Office-Supreme Court, U.S.
FILED
JUL 31 1965
JOHN F. DAVIS, CLERK

SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 331.

CLARENCE COLEMAN,
Petitioner,

vs.

JAMES McGETTRICK,
Sheriff of Cuyahoga County, Ohio,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Supreme Court of Ohio decided this case (2 Ohio St. 2d 177) in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

QUESTION PRESENTED.

Petitioner contends the denial of bail pending appeal of his conviction of a felony in the state court constitutes denial of due process in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE.

The petition herein results from an original action for a writ of habeas corpus filed in the Supreme Court of Ohio and decided May 19, 1965. The opinion of the Court is printed in full as Appendix B of the petition herein.

Clarence Coleman, the petitioner, on January 28th, 1965, was found guilty of receiving stolen property, under the felony provision of Ohio Revised Code Section 2907.30. Petitioner has a long history with the FBI and the local police authorities in Ohio. Aside from numerous arrests, his record of conviction is:

> July 10, 1942 Convicted in Detroit, Mich. on charge of violating Dyer Act.
>
> Feb. 16, 1948 Convicted in Cleveland, Ohio, Federal Dist. Court, violation of Harrison Act, sentenced to Federal Penitentiary, Milan, Mich.
>
> June 9, 1950 Convicted in Cleveland, Ohio, of possession of marijuana, sentenced to Ohio Penitentiary.
>
> Feb. 15, 1954 Convicted of violation of Harrison Act, sentenced to Federal Penitentiary at Atlanta, Ga.
>
> July 25, 1958 Convicted of clearing house violation, Cleveland, Ohio; sent to County Jail.
>
> Sept. 30, 1959 Convicted in Cleveland, Ohio, of carrying concealed weapon, sentenced to Ohio Penitentiary.
>
> Jan. 28, 1965 Convicted of receiving stolen property, sentenced to Ohio Penitentiary.

After petitioner's conviction of receiving stolen property, both Common Pleas Court and the Court of Appeals for Cuyahoga County refused to admit the petitioner to bail. At a hearing before three judges of the Court of Appeals the record of petitioner's convictions and arrests was examined, as was the question of whether substantial

questions would be presented in the appeal of his conviction and what the future conduct of Coleman might be in relation to the possibility of his committing future crimes while at large on bail.

ARGUMENT.

The sole question presented by the petition herein is whether a state court after the conviction of an accused can deny bond pending appeal of that conviction. In Ohio the law is settled that bail is not a right that must be granted pending appeal, and the Ohio courts have so held. The Supreme Court of Ohio dealt with this question in *In re Thorpe* (habeas corpus), 132 O. S. 119. The first and second syllabi hold:

> "1. The provisions of Article I, Section 9 of the Ohio Constitution guaranteeing the right to bail, are not effective subsequent to judgment of conviction in the trial court. (In re Halsey, 124 Ohio St. 318, approved and followed.)
>
> 2. One convicted of a felony is not entitled as a matter of right to be admitted to bail or to have execution of sentence suspended pending appeal of such judgment of conviction in a reviewing court; but the trial court is authorized by Section 13453-1, General Code, to suspend execution of sentence and release the defendant upon approved recognizance pending such appeal."

In the opinion, by Matthias, *J.*, it is stated:

> "There is no contention that any right to a suspension of execution of sentence and admission to bail pending an appeal proceeding is conferred by any constitutional provision. That any such contention would not be well founded has been specifically held by this court in the case of *In re Halsey,* 124 Ohio St., 318, 178 N. E. 271, 77 A. L. R. 1232, in the following

proposition of the syllabus: *'Section 9 of the Ohio Bill of Rights guarantees the right to bail only before judgment of conviction in the trial court.'"* (Emphasis added.)

The federal court decisions likewise fail to support the position of the petitioner in the case at bar.

Rule 46(a) of the Federal Rules of Criminal Procedure is found in Title 18, United States Code Annotated, at page 320. Section (2) of that rule states the federal provision as to bail pending appeal as follows:

> "(2) *Upon Review.* Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail. As amended Apr. 9, 1956, eff. July 8, 1956."

The language of this rule and the cases set forth in the annotation clearly hold that the position of the petitioner is untenable, not only under the Ohio decisions heretofore cited but likewise under the decisions of the federal courts and the United States Supreme Court. Bail pending appeal is not a right but a discretionary matter to be decided by the trial or appellate courts.

At p. 331, under Rule 46, 18 U. S. C. A., are cited cases that discuss bail upon review generally. It is clear from a perusal of these cases that bail is not a mandatory right but a discretionary privilege pending appeal. In

Ward v. United States (1956), 76 S. Ct. 1063, 1 L. ed. 2d 23, it is held:

> "Under this rule providing that bail may be allowed pending appeal or certiorari unless it appears that appeal is frivolous or taken for delay, there may be considerations other than frivolity or delay which will justify denial of bail."

The federal cases hold that there are instances where a denial of bail may be justified. It is held in *Rhodes v. U. S.* (C. A. W. Va. 1960), 275 F. 2d 78, that:

> "On application for bail pending appeal from judgment of conviction, some of questions to be considered are whether appeal is insubstantial or frivolous, whether there is a real danger of defendant fleeing, *whether defendant has committed prior offenses* and *whether defendant will commit additional offenses if enlarged on bail.*" (Emphasis added.)

The Ohio courts have recognized that it is proper for the court to consider the record of the accused, whether there is a likelihood of his going on to commit other crimes while out on bail, whether there is any danger that he will flee, and many other circumstances, in deciding whether bail should be allowed. Very recently the Supreme Court of Ohio, in *Colavecchio v. McGettrick* (2 Ohio St. 2d 290) (decided June 23, 1965), referred to *Coleman v. McGettrick* (the case at bar), pointed out that release on bail pending an appeal is not a matter of right but lies within the sound discretion of the reviewing court, and that the Court, in an action in habeas corpus, will not interfere with the exercise of such discretion unless there appears to have been a gross abuse thereof. The opinion states that the possibility that the person seeking bail may abscond during the time he is at large is only one of the factors which must be taken into consideration in granting or

denying bail, and that the conduct of an accused in relation to the possibility of his committing further crimes while at large on bail may well enter into the consideration of the court.

In *Rehman v. California*, 13 L. ed. 2d 17, 85 S. Ct. __, there was decided the question of bond for a doctor convicted in California, who had been allowed bail on appeal in the state courts if he would post bond and surrender his license to practice medicine. His petition for certiorari challenged the right of the state court to take away his doctor's license pending appeal. Mr. Justice Douglas entered an order lifting the condition of bail that the doctor surrender his license to practice. Thereafter the state court refused all bail on the ground that he was a menace to the community and would not allow him to remain on bail if he had the privilege of practicing medicine. When the case again came to this Court, Mr. Justice Douglas stated in the decision:

> "Subsequent to the entry of my order, the State sought an affirmative answer to this underlying question by filing a motion with the trial judge for a revocation of bail. After a hearing on the motion the judge * * * denied all bail and remanded the applicant to custody, acting on the basis that 'to permit Dr. Rehman to remain on bail pending appeal constitutes an immediate, clear and present danger imperiling, jeopardizing and threatening the health, safety, and welfare of the community.' "

The opinion refers to the statement in *Carbo v. United States*, 7 L. ed. 2d 769, 774, 82 Sup. Ct. 662, 666, that "If * * * the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail." The opinion concludes:

> I am unable to say that the trial judge acted in abuse of his power and that there is no evidence to support his findings.

CONCLUSION.

The Ohio Supreme Court has held that under the facts in this case there was no abuse of discretion in the action of the courts denying bail. The petitioner has not cited any authority in support of his position that the denial of bail pending appeal constitutes a deprivation of constitutional rights entitling him to review by this Court. The writ should therefore be denied.

Respectfully submitted,

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